BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GREGORY P. GORES	)	
Claimant	)	
VS	)	
	)	
CITY OF WICHITA	)	
Respondent	)	Docket No. 255,346
Self-Insured	)	
	)	
	)	

ORDER

Claimant appealed from the November 7, 2001 Award entered by Administrative Law Judge (ALJ) John D. Clark. The Appeals Board (Board) heard oral argument on April 12, 2002, in Wichita, Kansas.

APPEARANCES

Kim R. Martens of Wichita, Kansas, appeared for the claimant. Edward D. Heath, Jr. of Wichita, Kansas, appeared for the respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

The ALJ found claimant's January 22, 1999 injury resulted in a 36 percent loss of use to the left upper extremity at the level of the shoulder. [1] Claimant contends that he suffered permanent impairment to both upper extremities and, therefore, the ALJ erred by not awarding permanent partial disability compensation based upon a general body disability. Claimant further contends that he is entitled to an award based upon work disability. [2] Respondent was unable to permanently accommodate claimant's restrictions. The Medical Disability Leave Board for the City of Wichita determined claimant was permanently and totally disabled from his employment as a police officer. His last day of work with the City of Wichita was in June 2000. His disability determination became effective August 2, 2000.

Conversely, respondent requests that the ALJ's award be affirmed in all respects. Accordingly, the nature and extent of claimant's disability is the only issue for review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

As compensability is not at issue and the circumstances surrounding claimant's injury and subsequent treatment are set out in the ALJ's Award, those facts need not be repeated here. Stated briefly, claimant was a police officer with the City of Wichita. He injured his left arm apprehending a suspect.

Left elbow surgery was performed December 10, 1999 by Bernard F. Hearon, M.D. Due to complications resulting from that surgery claimant was sent to the Mayo Clinic in Rochester, Minnesota, where he underwent two additional surgeries in June and August 2000. Shortly thereafter, in approximately September 2000, claimant began experiencing pain in his right elbow, in addition to his ongoing left arm, shoulder, neck and head pain. Claimant attributed the right arm pain to overuse of that extremity from compensating for the injured left upper extremity.

Claimant was examined by board certified orthopedic surgeon C. Reiff Brown, M.D., on November 13, 2000. Dr. Brown described claimant's original injury as a tear of the ulnar collateral ligament of the left elbow as well as ulnar neuropathy and trauma to the articular surface. The residual instability of the elbow joint is leading to traumatic arthritic changes, ongoing weakness, discomfort and crepitus. Residual symptoms from the first surgery included damage to the medial cord of the brachial plexus with residual capsulitis

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[1] K.S.A. 44-510d(a)(13).

[2] K.S.A. 44-510e(a).

and synovitis involving the left shoulder resulting in loss of range of motion and pain in the left arm, shoulder, neck and head (occipital headaches). In addition, as to the right elbow symptomology, Dr. Brown diagnosed lateral humeral and epicondylitis, an overuse syndrome directly related to the left elbow injury and the treatment he received for that injury. Dr. Brown rated claimant's functional impairment as 30 percent to the left upper extremity at the shoulder level and two percent to the right upper extremity all in accordance with the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment,* (4th ed. rev.) These two ratings he converted and combined into a 19 percent permanent partial impairment of function of the body as a whole. Dr. Brown did not provide any impairment of function rating for claimant's problems in the upper back and neck, nor for the headaches.

Board certified surgeon J. Mark Melhorn, M.D., examined claimant for rating purposes on April 24, 2001. At that time claimant presented symptoms in the left elbow, right hand and wrist, right elbow, left posterior scapular area, left side of the neck, left posterior occipital area and the left forehead over the ear moving around anteriorly to above the eye. Dr. Melhorn said he could not attribute claimant's right upper extremity, posterior scapular and occipital symptoms to the initial traumatic event of January 22, 1999, based on the history he was provided and claimant's lack of symptomology during the period of time Dr. Melhorn treated claimant between March 9, 1999 and May 1,1999. Dr. Melhorn was never provided with the treatment records from the Mayo Clinic. He diagnosed left elbow osteoarthritic pattern, medial collateral ligament laxity and a residual ulnar peripheral nerve type injury at the elbow. Furthermore, although Dr. Melhorn acknowledged a brachial plexus component, based on the anatomy of the brachial plexus he would not say that claimant has a whole body impairment. He rated claimant's impairment as 36 percent to the left upper extremity at the level of the shoulder. When asked whether claimant's right upper extremity symptoms could be related to overuse as claimant described, Dr. Melhorn answered:

> I have a little bit of trouble with overuse compensatory type issues because most of the studies currently demonstrate that that does not occur. **In this case, I do believe it is reasonable that based on his history and the period of immobilization, that the individual may have had a period where his activities were significantly increased, there was a period of overuse with regard to the right**. However, if you approach that pattern and you look at traditional pathoanatomic physiological mechanisms, muscle activity, and then the activity, the increased activity is removed, the symptomtology abates or disappears. In his case, it didn't. And so that doesn't fit in a traditional pattern, it doesn't make sense medically. And based on the lack of objective findings during my examination doesn't allow me to apply the AMA Guides for Permanent Physical Impairment [sic]. **That doesn't say he doesn't have pain, I'm sure he does, I'm just saying that**

> **from a medical point of view, strictly based on science, I can't make the relationship**. [3] (*Emphasis added*)

Dr. Melhorn said he thought claimant was an honest reporter of his symptoms and did not disagree that claimant's pain in his right arm may be limiting his ability to function with regard to that arm.

Due to the conflicting opinions, Judge Clark ordered an independent medical evaluation by Philip Roderick Mills, M.D., who is board certified in physical medicine and rehabilitation. Dr. Mills examined claimant on July 12, 2001. In his opinion, claimant had a 26 percent permanent impairment of function to the left upper extremity. Claimant also described right elbow pain and tingling in the right hand, particularly the little and ring fingers which are aggravated by certain movement of the arms. These symptoms started around September 2000, after claimant's left arm was placed in some type of immobilization for a period of months. Dr. Mills' examination of claimant's right upper extremity revealed tenderness in the lateral epicondyle and to a lesser extent medial epicondyle. Pursuant to the *Guides*, in his opinion claimant had a one percent permanent partial impairment to the right upper extremity based on pain and tenderness however, when asked whether the impairment in claimant's right upper extremity is the direct and natural result of the January 1999 injury, Dr. Mills answered that he could not say it to a reasonable degree of medical probability or certainty but "there certainly may be a relationship." [4] Dr. Mills said he had no reason to question or doubt the validity of sincerity of the complaints claimant gave concerning his right upper extremity. In that regard, Dr. Mills was read portions of claimant's regular hearing testimony concerning the onset of his right arm complaints and claimant's testimony attributing the symptoms in his right elbow to overuse "due to the fact that I had to wear the immobilizer braces on the left arm." [5] Dr. Mills was then asked:

> Q. (Mr. Martens) Doctor, does the history information that you elicited from Mr. Gores, including the overcompensation with the right upper extremity from the left upper extremity immobilization due to the bracing support, that the most likely cause of the epicondylitis of the right upper extremity of the causes that we know about was the immobilization of the left upper extremity and then the corresponding extra use of the right upper extremity?

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[3] Melhorn Depo. pp 21-22.

[4] Mills Depo at 15.

[5] Mills Depo at 21.

A. (Dr. Mills) Well, I certainly think it may be. Here's the problem that you have. People get lateral and medial epicondylitis, they just do. Immobilization of an elbow still leaves significant mobilization of the shoulder and wrist.

So you still have, even if you can't move your one elbow, you still can have fairly good function because you have such tremendous mobility of the shoulder. So while it certainly is a plausible factor, the law says I have to state within a reasonable degree of medical probability, and I really can't say that.

I can say I think it (sic) a very plausible story, I think that it may, in fact, be the reason, but there is a lot of other factors that would be into play. And if it was, you would expect it to have resolved. Because typically something like that would resolve.

So the two things I don't really understand is why it hasn't resolved, which makes me wonder if there is another process going on, not simply an immobilization of one hand. And so those are the reasons.

And you just try to wrestle with these back and forth, and you just have to come up with the best that you can say. Which for me was may [sic], which is well more than possible, I think it may be. But is it something that is more likely than not, I don't know, I can't say that. [6]

Furthermore, Dr. Mills acknowledged:

A. (Dr. Mills) I was unable to uncover any other reasons, and I did ask him about trauma and other things and he absolutely denied any.

Q. (Mr. Martens) Did you have any questions concerning his honesty and sincerity in that history?

A. No, I did not. [7]

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[6] Mills Depo. pp 23-24.

[7] Mills Depo. at 26.

All three physicians acknowledged claimant's complaints of pain from the left shoulder to the left side of his neck, headaches and right arm pain. However, no physician rated claimant's left trapezes area, his neck nor head pain. All three physicians acknowledged that claimant's right arm symptoms were functionally disabling, but only two considered that impairment to be rateable under the *Guides.* Only one, Dr. Brown, clearly attributed the right upper extremity impairment and rating to over compensation for the injured left upper extremity. Dr. Mills considered this explanation to be plausible but, unlike Dr. Brown, was not willing to state that opinion to a reasonable degree of medical probability. Nevertheless, he acknowledged that he could point to no other explanation, other than such conditions sometimes just appear in individuals. Dr. Melhorn was willing to attribute the right upper extremity symptoms to overcompensation, but only as a temporary condition. He did not give that causal relationship opinion for a permanent impairment, nor did he consider that right upper extremity impairment to be rateable under the AMA *Guides.*

All three physicians considered claimant to be credible historian and had no reason to doubt his sincerity. The Board likewise finds claimant credible. The Board further finds Dr. Brown's opinions to be the most persuasive and consistent with claimant's testimony. Accordingly, the Board adopts Dr. Brown's opinion that claimant has a 30 percent permanent partial impairment of function to his left upper extremity at the level of the shoulder as a result of his work-related injury and resulting treatment. In addition, claimant has an additional two percent permanent partial impairment of function of his right upper extremity which occurred as a direct and natural consequence of his left upper extremity injury. These ratings combined to a 19 percent permanent partial impairment of function to the body as a whole.

When a primary injury under the Workers Compensation Act is shown to have arisen out of the claimant's employment, "every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury." [8]

When a worker's accident results in injury to a part of his body which is included in the schedule under K.S.A. 44-510d, such injury does not preclude compensation for general bodily disability if the opposite extremity or an unscheduled part of the worker's body is also injured. When the injury is both to a scheduled member and to an

[8] *Bergemann v. North Central Foundry, Inc.*, 215 Kan. 685, 688, 527 P.2d 1044 (1974) (quoting *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 [1972]).

unscheduled portion of the body, or to two parallel extremities, compensation should be awarded under K.S.A. 44-510e. [9]

Because claimant's injuries constitute an "unscheduled" injury, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e.

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of injury.

But that statute must be read in light of *Foulk* [10] and *Copeland* [11] In Foulk , the court held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, for purposes of the wage loss prong of K.S.A. 44-510e, the court held that workers' post-injury wages should be based upon ability rather than actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injuries.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . . [12]

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[9] *See Pruter v. Larned State Hospital*, 28 Kan. App. 2d 302, 16 P.3d 975 (2000), *aff'd* 271 Kan. 865, 26 P.3d 666 (2001); *Bryant v. Excel Corp.*, 239 Kan. 688, 689, 722 P.2d 579 (1986).

[10] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[11] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[12] *Copeland* at 320.

The question then becomes whether claimant made a good faith job search effort following his termination by respondent after the injury. If claimant failed to make a good faith effort, or unreasonably refused to perform appropriate work as in *Foulk*, then claimant may be precluded from receiving an award based on a work disability. [13] The test concerning claimant's job search efforts is also one of good faith.

After claimant's last surgery and his release to return to work with restrictions, respondent determined that claimant was unable to return to his regular duties as a police officer and made no offer to return claimant to work in an accommodated or another position. Thereafter, claimant failed to make a good faith job search effort and was successful in only finding part-time work. Accordingly, the Board will impute a wage based upon the evidence of claimant's wage earning ability. The best evidence of that ability comes from the testimony of vocational expert Karen Terrill. She opined that claimant could earn from $10 to $12 per hour working within the restrictions recommended by Dr. Brown. In addition, she anticipated claimant could earn additional compensation that would add about another $69 to that hourly wage for a total of approximately $470 to $540 per week. Based primarily upon this testimony, the Board finds claimant retains the ability to earn $505 per week. Based upon the stipulated average weekly wage for the period after August 22, 2000 of $1,043.44, this results in a 52 percent wage loss.

Using the list compiled by Ms. Terrill of the work tasks claimant performed during the relevant 15 year period preceding his accident, Dr. Brown determined that claimant had lost the ability to perform 14 of the 25 total number of work tasks for a total task loss of 56 percent. Averaging the 52 percent wage loss with the 56 percent tasks loss as required by K.S.A. 44-510e(a), the Board finds claimant is entitled to a 54 percent work disability award beginning on August 2, 2000, the date claimant's termination by respondent was effective. From the date of accident until the date of termination, claimant is entitled to a permanent partial disability award based upon his percentage of functional impairment.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark, dated November 7, 2001, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gregory P. Gores, and against the respondent, City of Wichita, for an accidental injury which occurred

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[13] *See Swickard v. Meadowbrook Manor*, 26 Kan. App. 2d 144, 979 P.2d 1256 (1999); *Ramirez v. Excel Corp*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999).

on January 22, 1999, and based on an average weekly wage of $794.49 before August 22, 2000 and $1,043.44 thereafter.

As of February 6, 2003, claimant is entitled to 35.72 weeks of temporary total disability compensation at the rate of $366 per week or $13,073.52 followed by 44 weeks of permanent partial disability compensation at the rate of $366 per week or $16,104 for a 19 percent permanent partial general disability based on functional impairment, followed by 131.14 weeks of permanent partial disability compensation at the rate of $366 per week or $47,997.24 which is ordered paid in one lump sum followed by weekly payments of $366 for 37.77 weeks or $13,823.82, for a permanent partial general disability based on a 54 percent work disability and making a total award of $90,998.58, less the amounts previously paid.

All other orders contained in the Award are adopted by the Board.

IT IS SO ORDERED.

Dated this _____ February 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Kim R. Martens, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Respondent
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation